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Federal Communications Commission  
Office of the Secretary

EX PARTE OR LATE FILED

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ORIGINAL

October 5, 2007

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
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Re: *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Education and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, WT Docket No. 03-66; *Forty-One Late-Filed Applications for Renewal of Educational Broadband Service Stations*, Memorandum Opinion and Order, DA 07-205, File No. 0002525897 *et al.*; *Pending Applications for Reinstatement and Late-Renewal of Educational Broadband Service Licenses*  
***Response of Hempstead Independent School District to Written Ex Parte Presentation***

Dear Ms. Dortch:

Hempstead Independent School District ("Hempstead"), licensee of Educational Broadband Service ("EBS") Station WLX645 at Brenham, Texas, by counsel, hereby responds to the September 28, 2007 written *ex parte* communication ("Joint Comments") of the Catholic Television Network ("CTN"), the National ITFS Association, the Wireless Communications Association International, Inc. ("WCA"), Clearwire Corporation, NextWave Wireless Inc., Sprint Nextel Corporation ("Sprint") and Xanadoo, LLC ("Joint Commenters").

Hempstead filed its renewal application on May 8, 2007 (File No. 0003022184). The application included requests for waiver of Section 1.949 (a) of the Commission's Rules<sup>1</sup> and for reinstatement of the license because the renewal application was filed after the license expired. On June 15, 2007, Sprint – and only Sprint – filed a petition to deny the renewal application. On June 28, 2007, Hempstead moved to strike and opposed Sprint's petition. The matter is pending before the Commission.

<sup>1</sup> 47 C.F.R. §1.949(a).

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The Joint Commenters propose two so-called “clarifications” to final Commission rules adopted more than a year ago. As relates to the Hempstead, these proposals would prohibit the Commission from reinstating its license *nunc pro tunc* and according it a Geographic Service Areas (“GSAs”) that does not “split the football” with co-channel EBS licensees in neighboring markets.

Hempstead objects to several aspects of Joint Letter. First, none of the Joint Commenters has standing to participate in the individual, restricted adjudicatory proceedings pending before the Commission.<sup>2</sup> The Joint Commenters claim no direct injury that would result from reinstatement of Hempstead’s license or of any of the other contested proceedings. Allowing the Joint Commenters to have their views considered in more than 100 restricted adjudicatory proceedings<sup>3</sup> would essentially and impermissibly elevate them to party status in each of those proceedings. Moreover, it is irrelevant that the Joint Commenters believe that they “represent a consensus position of a majority of the 2.5 GHz industry.”<sup>4</sup> Cases pending before Commission staff are not properly decided based on the consensus of a handful of corporations and trade associations that seek, without party status, to persuade the Commission to adopt a decision that would prejudice Hempstead and other EBS licensees.

Second, it is far from clear that the so-called “clarifications” proposed by the Joint Commenters are “consistent with the Commission’s existing EBS licensing rules and policies.”<sup>5</sup> The questions of whether licenses should be reinstated and whether the licensees were granted a GSA as of January 10, 2005 lie at the heart of the Commission’s review of the record in the *Forty-One Renewals* reconsideration proceeding<sup>6</sup> and subsequent petitions to deny EBS renewal applications. Resolution of these questions will rest on the specific circumstances of the renewal applications in relation to the Commission’s statement in the *BRS/EBS Reconsideration Order*<sup>7</sup> that certain licenses would be deemed “in existence” and applicable legal authorities holding that

<sup>2</sup> See, e.g., *School Board of Palm Beach County*, DA 07-298 (rel. Jan. 28, 2007).

<sup>3</sup> See 47 C.F.R. §1.1208. On March 22, 2007, Sprint acknowledged the restricted nature of the individual adjudicatory proceedings when it filed its “Request to Designate Proceedings as ‘Permit But Disclose’” with the Commission. This request was opposed by a number of the affected licensees (which number has since grown). Commission staff has not acted on Sprint’s request.

<sup>4</sup> Joint Comments at 2.

<sup>5</sup> *Id.*

<sup>6</sup> *Forty-One Late-Filed Applications for Renewal of Educational Broadband Service Stations*, Memorandum Opinion and Order, 22 FCC Red 879 (WTB 2007) (“*Forty-One Renewals*”). Though its response here focuses on the affect the Joint Commenters’ proposals would have on the disposition of its license and renewal application, Hempstead agrees that the Commission’s decision in *Forty-One Renewals* should be affirmed.

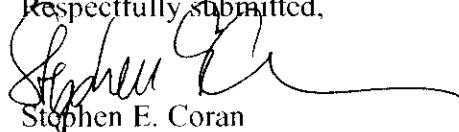
<sup>7</sup> *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Education and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Order on Reconsideration and Fifth Memorandum Opinion and Order, Third Memorandum and Order and Second Report and Order, 21 FCC Red 5606, 5695 (2006) (“*BRS/EBS Reconsideration Order*”).

authorizations do not become cancelled until the Commission so declares.<sup>8</sup> Notably, none of the Joint Commenters sought reconsideration of that language which, ironically, was adopted *verbatim* from WCA's earlier request for "clarification."<sup>9</sup>

Third, the Joint Commenters seek to impermissibly prevent the Commission from exercising its authority to reinstate licenses *nunc pro tunc*. In proposing that reinstated licenses should not be accorded a split of the overlap area, the Joint Commenters would strip from the Commission its authority to reinstate licenses as of the expiration of the previous license term. Of course, such a limitation would be inconsistent with the *nunc pro tunc* license reinstatement in *Forty-One Renewals*, and the Joint Commenters offer no authority for the Commission's ability to treat Hempstead and the other affected EBS licensees differently from those licensees that obtained reinstatement in that case.<sup>10</sup> Similarly, the Joint Commenters' proposal to permit the Commission to reinstate licenses *nunc pro tunc* in "in cases of manifest Commission error"<sup>11</sup> would, through its narrow application, prevent the Commission from acting in accordance with a broader public interest standard when circumstances dictate. Though the Joint Commenters may suggest a convenient resolution, it cannot be legally applied in the pending license renewal proceedings.

Hempstead shares the Joint Commenters' view that expeditious resolution of the numerous contested cases would facilitate certainty and promote transition planning and deployment. However, the Commission cannot properly change its policies in adjudicatory proceedings, deviate from its final rules, ignore its precedent or limit its reinstatement authority at the request of non-parties to restricted proceedings.

Respectfully submitted,



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<sup>8</sup> See, e.g., *Savannah College of Art and Design, et al.*, 18 FCC Red 26345 (2003), *aff'd, sub nom. Savannah College of Art and Design and Diocese of Savannah*, 04-1024 (D.C. Cir. 2004) (unpublished disposition).

<sup>9</sup> See Petition for Partial Reconsideration of WCA, WT Docket No. 03-66, filed Jan. 10, 2005, at 49. The language is as follows:

[w]here an incumbent station license was in existence as of January 10, 2005 and caused a splitting of the football, and that incumbent station license is later forfeited, the reclaimed territory reverts to the BRS BTA holder (if BRS spectrum) or to EBS white space (if EBS spectrum) regardless of whether the action/inaction that caused the forfeiture occurred prior to January 10, 2005.

*BRS/EBS Reconsideration Order* at 5695 (emphasis added).

<sup>10</sup> See *Melody Music v. FCC*, 345 F.2d 730 (1965).

<sup>11</sup> Joint Comments at 4.

### Certificate of Service

I, Christopher Worrells, of the law firm of Rini Coran, PC, do hereby certify that the foregoing "Response of Hempstead Independent School District to Written Ex-Parte Presentation" was served this 5<sup>th</sup> day of October, 2007 by depositing true copies thereof with the United States Postal Service, First Class postage prepaid, addressed as follows:

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95 North Avenue  
Burlington, VT 05401  
ATTN: Jane Sanders

Wayne County Board of Education  
419 South Main Street  
Waynesboro, TN 38485  
ATTN: Jerry Pigg

Canton R-V School District  
200 S. Fourth Street  
Canton, MO 63435

Stromsburg School District #10  
401 East 4<sup>th</sup> Street  
Stromsburg, NE 68666

Foreign Language and Culture Foundation  
850 Fay Road  
Syracuse, NY 13219  
ATTN: Kathleen Simcox

Florida Community College at Jacksonville  
501 W. State Street  
Jacksonville, FL 32202  
ATTN: Jeanne Miller

International Business College NM Inc.  
650 E. Montana Suite F  
Las Cruces, NM 88001

Oak Forest Academy  
600 Walnut Street  
Amite, LA 70422

Trenton Special School District  
201 W. 10<sup>th</sup> Street  
Trenton, TN 37074

4202 Fowler Avenue, SVC 1072  
Tampa, FL 33620  
ATTN: Lynn Rejniak

Sesser-Valier Community Unit #196  
4626 State Highway 154  
Sesser, IL 62884  
ATTN: Jason Henry

Independent School District #786  
301 Central Avenue S  
Bertha, MN 56437  
ATTN: Robert Sieling

Shelby County C-1 Schools  
3071 HWY 15  
Shelbyville, MO 63469-2225  
ATTN: Larry Smoot

Francis Marion High School  
P.O. Box 900  
Marion, AL 36756  
ATTN: Superintendent

Hermleigh Independent School District  
1026 School Avenue  
Hermleigh, TX 79526  
ATTN: Superintendent

Archd Hartford Diocesan School Office  
15 Peach Orchard Road  
Prospect, CT 06102  
ATTN: Rev. John Gatzak

Hubbard Hospital  
1005 D.B. Todd Blvd.  
Nashville, TN 37208

Meharry Medical Collage  
1005 Todd Blvd..  
Nashville, TN 37208

Rockne Educational Television  
320 Hamilton Street  
Albion, NY 14411

Tri County R-VII Schools  
904 W. Auberry Grove  
Jamesport, MO 64648

Utica College of Syracuse University  
Burrstone Road  
Utica, NY 13502

Carrollton Farmers Branch ISD  
1445 North Perry Road  
Carrollton, TX 75011

Grace Lutheran School  
2713 Flagler Avenue  
Key West, FL 33040  
ATTN: David Kolhagen

Mary Immaculate Star of the Sea School  
1010 Windsor Avenue  
Key West, FL 33040

Minford Local School District  
135 Falcon Road  
Minford, OH 45653

New Boston Local School District  
522 Glenwood Avenue  
New Boston, OH 45662

Riverview School District  
810 Raider Drive  
Searcy, AR 72143

Texas State Technical College  
2424 Boxwood  
Harlingen, TX 78550

West Blocton High School  
100 School Street  
West Blocton, AL 35184

Dallas-Fort Worth Hospital Council  
250 Decker Court  
Irving, TX 75062

Lawrence County Board of Education  
14131 Market Street  
Moulton, AL 35650

Mendocino Lake Community College District  
1000 Hensley Creek Road  
Ukiah, CA 95482

McCurtain County Higher Education Program  
P.O. Box 178, RT. 3  
Idabel, OK 74745

Otero Junior College  
1802 Colorado Avenue  
La Junta, CO 81050

Springhill High School  
1442 Sheppard Street  
Minden, LA 71055

Veblen School District  
516 8<sup>th</sup> Avenue W  
Sisseton, SD 57262  
ATTN: Cheryl Karst

\* Service copy also provided via email



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Christopher Worrells